93-121

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WHITE PLAINS TOWING CORP. d/b/a
DON'S TOWING and DONALD CHERICO,

Petitioners,

v.

HAROLD J. WRIGHT and E.P. STREIDER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals, upon finding that the District Court failed to apply the proper legal standard, with respect to Petitioners' First Amendment claim, properly held that the District Court's findings "compel" rejection of the Petitioners' claim?

2. Must a Petitioner claiming a constitutional violation of a liberty interest show that the stigmatizing charges were actually publicized?

3. Does a communication between police officers, that a given individual has been accused of being dishonest or is believed to have ties to organized crime, constitute a sufficient publication to warrant a ruling that the individual's liberty interest has been impermissible infringed?

4. Did the Court of Appeals properly reverse the District Court's conclusion that Respondents were not shielded by the doctrine of qualified immunity?

LIST OF ALL PARTIES

1.	WHITE PLAINS TOWING CORP. d/b/a DON'S TOWING	Plaintiff-Appellee
2.	DONALD CHERICO	Plaintiff-Appellee
3.	HAROLD J. WRIGHT	Defendant-Appellant
4.	E.P. STREIDER	Defendant-Appellant
5.	JAMES G. PATTERSON	Defendant

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PETITION FOR CERTIORARI

OPINIONS BELOW

To petitioners' knowledge, previous opinions rendered in this case have not yet been reported.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed, was entered on April 21, 1993.

2. No rehearing was requested.

3. This Court has jurisdiction to review the judgment or decree in question by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The relevant statutes are as follows:

Amendment I to U.S. Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment XIV to U.S. Constitution - Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property with due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in-

jured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. The Relevant Facts

Petitioner, White Plains Towing Corp. d/b/a Don's Towing, at all times relevant herein was engaged in the business of supplying towing services for all types of motor vehicles. Petitioner, Donald Cherico, is President. Petitioners are centrally located at and around Interstate 287 and also known as the Cross Westchester Expressway located in Westchester County, New York. For some time prior to July 31, 1985, Respondents utilized Petitioners' services to provide towing and related services along a designated portion of Interstate 287. However, in a letter signed by Respondent Wright, a Lieutenant and zone commander for the New York State Police, Hawthorne, New York, Petitioners were notified that "effective close of business July 31, 1985, your services utilized by the State Police on Interstate Route 287 are hereby terminated". Respondent Wright did not state the reason for his decision nor did he afford Petitioners a formal opportunity to contest the decision. At that time, Petitioner was replaced by another towing company. The other two companies on Interstate 287 continued providing services. Petitioners filed subsequent administrative complaints seeking to reverse the decision. However, these efforts were unsuccessful.

The evidence of record showed that in 1985 tow operators were not required to formally bid or contract in order to be able to operate and provide services on Interstate 287. Instead, the towing assignments were made by Respondent Wright upon the recommendation

of his subordinate officers. In fact, prior to the trial of this matter, the parties hereto stipulated that "the tower/wrecker dispatch system administered by Troop K for I 287 ... is not specifically authorized by, or codified in any statute or in any regulation of the State Police"; that "participation in the Troop K tower/wrecker dispatch system is not contractual in nature; and that assignments are not made or awarded based on bid; and that tow operators are not specifically licensed or issued permits by the State Police to operate or to provide services under the Troop K tower/wrecker dispatch system."

Pursuant to this system, aside from the three enumerated businesses and unless a motorist requested a specific towing company, Respondents did not dispatch other tow companies to assistance calls on Interstate 287. In fact, Respondents informed their dispatchers to only utilize those towing companies which had been designated for a certain zone. These dispatchers were directed not to use Petitioner.

At all times prior to the termination of services and subsequent, Petitioner filed repeated complaints to convince Respondents to utilize its towing services to a greater degree on said Interstate and, once terminated, to restore it to the roads. All of these complaints were rejected.

In addition, prior to being terminated, in April 1985, Petitioner Cherico lodged a complaint against Respondents. This complaint was made to the New York State Police, Respondents' employer. In this complaint, Petitioner Cherico accused Respondents of impugning his reputation by stating that he was a "thief", "no good" and associated with organized crime. Petitioner Cherico's complaint resulted in a formal investigation against Streider and Wright.

These complaints were discussed in a memorandum prepared by Respondent Streider dated July 26, 1985 to Major Stanley Hook, Troop Commander, in which he attempted to justify the decision to termination Petitioners' services. Respondent Streider, in this memorandum, made specific reference to the personnel complaint which Petitioner

Cherico had lodged against him and Respondent Wright. This memorandum concluded by stating:

> "Since Mr. CHERICO was permitted by the State Police to use his tow trucks on I-287, he has been nothing but a source of annoyance and embarrassment to the New York State Police. His constant complainant [sic] that he doesn't get enough work has been discussed with him over and over again. He has caused needless time expenditure by SP Hawthorne station supervisory personnel, Zone 4 supervisory personnel, Troop supervisory personnel and personnel at Division Headquarters. Many fruitless hours have been spent in investigations, interviews, and report writing, reading and reviewing. Mr. CHERICO is a potential source of embarrassment as he does not possess the proper driver's license to operate some of his equipment. Attempts by member to find Mr. CHERICO in such an unlicensed situation have thus far proved fruitless, as he utilizes other drivers.
>
> It is not within the best interests of the Division of State Police to have a person of Mr. CHERICO's ilk providing services to the users of an interstate highway patrolled solely by the State Police. His services are therefore being terminated effective close of business July 31, 1985."

Petitioner Cherico, during the trial, testified that Officers to whom he complained said they had been instructed not to call Cherico because his brother had been arrested for attempted murder and his family was tied to organized crime.

Believing that the termination of their services was unlawful, Petitioners commenced the within action in the United States District Court for the Southern District of New York. Petitioners commenced

this action under 42 U.S.C. Section 1983, alleging that Respondents' actions violated their First and Fourteenth Amendment Rights to free speech, to petition for the redress of grievances, to equal protection and to due process of law.

B. The Prior Proceedings in the Courts Below

In December 1991, a bench trial was held before the Honorable Charles L. Brieant, United States District Court for the Southern District of New York. The District Court, after trial, held that Respondents caused the State Police to discontinue its services with Petitioners, in violation of their rights under the First Amendment and the Due Process Clause of the Fourteenth Amendment of the Constitution.

With reference to the due process issue, the District Court ruled that Respondents had infringed Petitioners' protected liberty interests. In so holding, the District Court held:

> "Essentially, the Court finds that the plaintiff was denied procedural due process and that he was denied an opportunity to have a hearing and an opportunity to clear his commercial and individual name of the totality of these charges of wrongdoing which are listed against him in the [Streider Memorandum].
>
> . . . .
>
> In order to satisfy the constitutional standards for due process, in order to deprive this plaintiff of his allocated rights in this particular three-mile section of highway, it was necessary at the very least that either Mr. Str[ei]der or Mr. Wright would have confronted him with each of these items relied on in [the Streider Memorandum] and given him an opportunity to explain or answer to these charges. I am convinced that

> had this opportunity been given, some of the charges could have been explained. Probably some of them could not.
>
> The totality of what took place here was a denial of procedural due process involving an important right having to do with the protected interest of his good name as well as the commercial relationship, which is almost equivalent to employment."

The District Court also held that Respondents had violated Petitioners' First Amendment rights. More specifically, the District Court ruled that Petitioners' personnel complaint against Respondents was a substantial motivating factor behind the decision to terminate Petitioners' services. The District Court, in finding for Petitioners, rejected Respondents' claim of qualified immunity. The District Court awarded Petitioners $1.00 in nominal damages and $22,700 in attorney's fees.

Thereupon, Respondents appealed the ensuing judgment to the United States Court of Appeals for the Second Circuit. On appeal, Respondents contended principally (1) that the District Court erred in ruling that Petitioners' First Amendment and due process rights were violated, and (2) that Respondents were, in any event, entitled to dismissal of the due process claims on the ground of qualified immunity. Petitioners cross-appealed, contending principally that the District Court erred in refusing to award more than nominal damages.

In a Decision dated April 21, 1993, the Court of Appeals reversed the District Court's judgment and remanded with instructions to dismiss the Complaint. This Decision was filed in the Office of the Clerk of the Court of Appeals on April 21, 1993. Petitioners now file this Petition for a Writ of Certiorari.

The basis for federal jurisdiction in the Court of first instance was under 28 U.S.C. Sections 1331, 1343, 1346(b) and 2301. This action

arose under the Constitution and Laws of the United States, more specifically, Amendments I and XIV and 42 U.S.C. Section 1983.

Pursuant to Rule 29.1 of the Rules of this Court, there is no parent or subsidiary company to be listed.

ARGUMENT

The following discussion will reveal that this petition should be granted because the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

1. The Court of Appeals upon finding that the District Court failed to apply the proper legal standard, with regard to Petitioners' First Amendment claim, departed from the accepted and usual course of judicial proceedings, when it held that the District Court's findings "compel" rejection of the Petitioners' claim.

The Court of Appeals, in reversing the District Court's finding of a violation of the First Amendment, held:

> "Even accepting, however, the proposition that Cherico's personnel complaint involved a matter of public concern and was a 'substantial motivating factor' in defendants' decision to terminate WP Towing's assignment, we conclude that the trial court's analysis was incomplete, for the court did not go on to consider whether or not defendants would have terminated that assignment even had there been no personnel complaint. The court's other findings, which are amply supported by the evidence, compel the conclusion that

> defendants would indeed have terminated Cherico's towing referrals even in the absence of his short-lived personnel complaint."

Judge Lumbard dissented on this issue. He concluded that "In light of the district court's finding that Cherico's complaint was a 'substantial motivating factor' in the defendants' decision to cancel the referrals, I cannot conclude, on this record, that defendants have met their burden of proof. Therefore, I believe the more appropriate course is to remand this matter to the district court for further findings."

Petitioners respectfully submit that the record, rather than compelling a reversal, indicated that the District Court would have ruled in Petitioners' favor. The record contains numerous references on this point.

The Court relied upon the fact that Respondents specifically mentioned the Complaint in their July 20, 1985 report that most, if not all, of the alleged consumer complaints were unfounded to rule that the personnel complaint was a substantial or motivating factor and to support the claim that Petitioners' services would not otherwise have been terminated. In fact, in its bench decision, the District Court spent a great deal of time reviewing each alleged justification offered by Respondents. The court found that most, if not all, of the so-called consumer complaints were unfounded, that they did not provide a basis for discharge and that Petitioners could have sufficiently rebutted them if given the opportunity. The court also noted that Petitioners' complaints about the allocating of the work were not unusual and that it happened elsewhere. The court continued:

> "If that was all that was involved (defendants) could handle it. At some point they formed a dislike there, which is quite apparent and it reflected in referring to this plaintiff as "a person of Mr. Cherico's ilk."

Obviously, the District Court was referring to the personnel complaint.

The record reveals that Respondents' supposed justifications were merely a pretext and a cover to justify the termination of Petitioners' services in the manner complained of. Respondents would have us believe that Petitioners' services were terminated because of motorist complaints against them. A close review of those alleged complaints revealed that the District Court correctly held that they, could not justify Petitioners' removal and were instead indicative of Respondents' bad faith.

Petitioners' respectfully submit that the Court of Appeals, by substituting its own judgment for that of the District Court, as contained in the record, and by stating that the record "compelled" its own conclusion, so departed from accepted judicial standards that this Court's intervention is required.

2. The Court of Appeals, in addressing Petitioners' liberty interest or "stigma plus" argument, concluded that the stigmatizing charges were not publicized in the course of termination and, therefore, a liberty interest argument could not be supported. The Court of Appeals concluded:

> "Here, even assuming arguendo that plaintiffs established that their terminable-at-will status was sufficient to constitute the "plus" element of the "stigma plus" standard,judgment in their favor was inappropriate since the trial court did not make a finding that there had been any dissemination of defendants' stigmatizing statements sufficient to affect plaintiffs' standing in the community or to foreclose future job opportunities. Nor would such a finding have been supported by the record, for there appears to be no evidence that defendants made the critical statements to the public in general, or to any member of the public in particular, or to any person inquiring as to plaintiffs' towing operations."

Petitioners respectfully believe that this ruling must be clarified because it appears that the publication need not actually occur. The Court should, therefore, clarify the issue of publication in the context of the "stigma plus" argument.

It is clear that the Second Circuit in the past did not define the concepts of what constitutes publication and what encompasses in the course of termination as narrowly as it now has us believe. The Court in Brandt v. Board of Co-Op Educational Service, 820 F. 2d 41 (2d Cir. 1987) discussed these issues.

In Brandt, the plaintiff relied upon the presence of alleged defamatory matter in a file. He argued that, although there was no public disclosure of the reasons of the discharge, the presence of the charges in his file satisfies the public disclosure requirement because there is a likelihood that these charges may be disclosed in the future.

The Court agreed. It held:

> The public disclosure requirement has been satisfied where the stigmatizing charges are placed in its discharged employer's personnel file and are likely to be disclosed to prospective employers.

Id. at 45.

In so holding, this Court reasoned:

> More important, the 'public' disclosure requirement set forth in Bishop and Gentile is not a self-defining concept. The purpose of the requirement is to limit a constitution claim to those instances where the stigmatizing charges made in the course of discharge have been or are likely to be disseminated widely enough to damage the discharged employee's standing in the

> community of foreclose future job opportunities. In determining the degree of dissemination that satisfies the 'public disclosure' requirement, we must look to the potential effect of dissemination on the employee's standing in the community and the foreclosure of job opportunities. As a result, what is sufficient to constitute 'public disclosure' will vary with the circumstances of each case.

Id. at 44.

The Court continued:

> Brandt need not wait until he actually loses some job opportunities because the presence of the charges in his personnel file coupled with a likelihood of harmful disclosure already place him between the devil and the deep blue sea.

Id. at 45.

The Court clearly distinguished these circumstances from those which existed in cases such as Bishop v. Wood, 426 U.S. 341 (1976) upon which Respondents relied. In Bishop, the reasons for the termination were communicated orally to the employee, in private. There was no written document.

This discussion has revealed that the disclosure standard was, contrary to Respondent's assertion, satisfied by the placement of memos in State Police files. Moreover, there was no requirement, as Respondents assert, that the memorandum be actually publicized to anyone.

This discussion has also revealed that Court of Appeals' Decision with reference to the issue of publication was in sufficient conflict with previous decisions so as to merit this Court's review.

3. In further addressing the question of publication, the Court of Appeals discussed the significance that should be attributed to a communication between police officers that a given individual has been accused of being dishonest or having ties to organized crime. The question arises whether this communication constitutes a sufficient publication.

With respect to this issue, the Court of Appeals noted that the District Court found that Respondents had made statements to other police officers who were not decision makers and who were therefore presumably not privileged to receive the information.

The Court of Appeals, with reference to the sufficiency of this publication, held "This Court has never answered that question; we are not aware of any other Court that has answered it; and as indicated above, we would be surprised to find it answered in the affirmative."

Under these circumstances, this question should now be decided by the Court.

4. Finally, Petitioners respectfully submit that the Court of Appeals departed from accepted judicial standards when it substituted its judgment for that of the District Court with reference to the issue of qualified immunity.

In reversing the District Court's finding, the Court of Appeals held that:

> "[B]ecause WP Towing's exclusive assignment as towing operator for part of I-287 was a nontraditional relationship and was terminable at will, it could not have been clear whether that assignment provided plaintiffs with a status sufficient to give them a due-process-protected liberty interest in avoiding termination without a name-clearing hearing."

This conclusion was in conflict with the District Court's reasoning. On this issue, the District Court had held:

> The relevant inquiry in determining whether an immunity defense is available is whether the federal law violated was clearly established, not whether a reasonable person would have known the law, or, as defendants argue, whether Troop K had a formal procedure for terminating towing services on the roads it patrols. Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action."); Harlow v. Fitzgerald, 457 U.S. 800 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") Salahuddin v. Coughlin, 781 F.2d 24, 27 (2d Cir. 1986) ("Officials are held to have constructive knowledge of established law.")
>
> As early as 1972, the United Supreme Court had recognized that a liberty interest is involved and due process required where, as here, the state terminates or fails to renew an individual's employement and accompanies that action with the publication of false or stigmatizing information. Board of Regents v. Roth, 408 U.S. 564, 573-574 (1972); Bishop v. Wood, 426 U.S. 341, 348 (1976); Codd v. Velger, 429 U.S. 624 (1977). This Court therefore concludes that the established law in 1985 and at the time the defendants terminated plaintiffs' towing franchise based on unsubstantiated accusations, including accusations made

> known to persons outside the chain of command that Mr. Cherico was associated with the Mafia and a "thief", required procedural due process in the form of a hearing. Defendants contend that they properly terminated plaintiffs franchise without granting any opportunity to defend against those charges. The established law is to the contrary, for more than two decades, and the defendants are charged with constructive knowledge of the established law.

The fact that the District Court noted that the acts of Respondents Streider and Wright in not providing Petitioners with any semblance of due process prior to their removal from the roadways in question were clear cut and egregious only serves to enhance the soundness of its holding.

The District Court's rationale is in accord with applicable precedent including this Court's Decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982).

The District Court's conclusion is easily reconcilable with cases such as Neu v. Corcoran, 869 F. 2d 662 (2d Cir. 1989) and Walentas v. Lipper, 862 F. 2d 414 (2d Cir. 1988). Neu involved a plaintiff who had no economic or occupational relationship and/or status with a public authority. In Walentas, the plaintiff was a person seeking state employment. These situations are far different from one where a plaintiff is already enjoying an economic or other relationship or status with the State, as with the instant action.

Surely a reasonable person, utilizing an objective standard would be expected to realize that one already enjoying the benefits of a relationship and/or status would be entitled to at least some right to be heard, unlike the situations in Neu and Walentas.

Under these circumstances, this Court should hold that the Court of Appeals grossly departed from the accepted and usual course of

judicial proceedings and sanctioned a departure from applicable precedent.

CONCLUSION

For the foregoing reasons, petition respectfully requests that this court grant this petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

— — — — — — — — — —

Nos. 469, 566 August Term, 1992

(Argued: November 17, 1992 Decided APR 21 1993

Docket Nos. 92-7617, -7663

WHITE PLAINS TOWING CORP. d/b/a DON'S TOWING and DON CHERICO,

Plaintiffs-Appellees-Cross-Appellants,

-v.-

JAMES G. PATTERSON,

Defendant,

HAROLD J. WRIGHT and E.P. STREIDER,

Defendants-Appellants-Cross-Appellees.

Before: LUMBARD, FEINBERG, and KEARSE, Circuit Judges.

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, then-Chief Judge, awarding plaintiffs nominal damages and attorney's fees for violations of First Amendment and due process rights.

Reversed and remanded with instructions to dismiss complaint.

Judge Lumbard concurs in part and dissents in part, in a separate opinion.

ALAN E. WOLIN, Hicksville, New York (Lecci, Wolin & Wolin, Hicksville, New York, on the brief), for Plaintiffs Appellees-Cross Appellants .

ALEX CASPARI, Assistant Attorney General of the State of New York, New York, New York (Robert Abrams, Attorney General of the State of New York, Frederic L. Lieberman, Assistant Attorney General of the State of New York, New York, New York, on the brief), for Defendants Appellants-Cross-Appellees .

KEARSE, Circuit Judge:

Defendants Harold J. Wright and E. P. Streider ("defendants"), who at the pertinent times were New York State Police ("State Police") officers, appeal from a judgment entered in the United States District Court for the Southern District of New York following a one-day bench trial before Charles L. Brieant, then-Chief Judge, awarding plaintiffs White Plains Towing Corp . ("WP Towing") and its president Don Cherico (collectively "Cherico") $1 in nominal damages and $22, 700 in attorney's fees on their claims under 42 U.S.C. 1983 (1988) that defendants caused the State Police to discontinue a service relationship with WP Towing, in violation of plaintiffs' rights under the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution. On appeal, defendants contend principally (1) that the district court erred in ruling that plaintiffs' First Amendment and due process rights were violated, and (2) that

defendants were, in any event, entitled to dismissal of the due process claims on the ground of qualified immunity. Plaintiffs cross-appeal, contending principally that the district court erred in refusing to award more than nominal damages. For the reasons below, we conclude that plaintiffs' First Amendment claims and certain of their due process claims lacked merit and that defendants were entitled to dismissal of the remaining due process claims on the ground of qualified immunity. Accordingly, we reverse the judgment of the district court.

I. BACKGROUND

Troop K of the State Police is responsible for securing the safety of members of the motoring public on highways within its jurisdiction. Interstate Route I-287 in Westchester County, New York, commonly known as the Cross-Westchester Expressway ("I-287" or "Expressway"), is within the jurisdiction of the State Police Station in Hawthorne, New York. Wright was a State Police lieutenant; Streider was a sergeant; both were assigned to the Hawthorne Station. Cherico was in the business of providing towing services. The present controversy arises from the 1985 decision of Wright and Streider to terminate Troop K's highway towing assignments to Cherico. Many of the facts are undisputed.

A. The Events

For the purpose of assisting motorists with disabled vehicles, Troop K divided the 11-mile-long I-287 into three zones and assigned each zone to one towing company that would, when summoned, provide service. These assignments gave the towing company the exclusive right to towing referrals in its own zone to the extent that, unless a disabled motorist requested otherwise, the State Police dispatched the towing company assigned to that zone to render aid. The parties

stipulated that "the tower/wrecker dispatch system administered by Troop K for I 287 . . . is not specifically authorized by, or codified in any statute or in any regulation of the State Police"; that "participation in the Troop K tower/wrecker dispatch system is not contractual in nature; and that assignments are not made or awarded based on bid; and that tow operators are not specifically licensed or issued permits by the State Police to operate or to provide services under the Troop K tower/wrecker dispatch system." (Stipulation dated May 30, 1991 ("Stipulation"), ¶¶ 9, 13.)

Troop K first assigned one zone of I-287 to Cherico for a two-day period in 1984. Some months later in 1984, Cherico was again assigned a section of I-287, which it serviced for the next 9-12 months. During the latter period, plaintiffs orally and in writing made repeated demands to defendants for a larger share of the towing assignments on I-287 and another highway. In addition, on or about April 19, 1985, plaintiffs lodged a formal complaint with the State Police against Wright and Streider, alleging that those defendants had impugned Cherico's reputation by stating that he was a "'thief', 'no good' and associated with organized crime. . . . [P]laintiffs' complaint resulted in a formal State Police investigation; . . . thereafter, Mr. Cherico withdrew his complaint." (Stipulation ¶ 21.)

In July 1985, by letter dated July 26, Wright informed Cherico that his I-287 assignment would be terminated on July 31, 1985. The letter stated that Troop K would not summon Cherico for a towing job unless the motorist specifically requested him.

Wright informed his supervisor of this action in a brief communication enclosing a memorandum prepared by Streider (the "Streider Memorandum" or "Memorandum") detailing reasons for the termination. The Streider Memorandum identified the towing companies to which the three I-287 zones were then assigned and stated that the towing operators other than Cherico had not made any complaints, "nor have they been complained about by motorists. However, DON

CHERICO is another matter." The Memorandum set forth the following chronology of specific incidents involving plaintiffs: (a) in October 1984, Troop K received a complaint from an insurance company that Cherico had billed nearly $15,500 for tow work on a tractor trailer, and that he had refused to release the truck's cargo in order to force payment of his charges; (b) in January 198S, a motorist complained that despite a sign on Cherico's truck stating that storage charges were $5 a day, Cherico charged the motorist $10 a day; (c) on April 18, 1985, Cherico made a personnel complaint against Wright and Streider, alleging that they had stated that he was connected with organized crime; "[o]n April 22, 1985, the complainant appeared at Troop K Headquarters to retract his complaint and the matter was closed as unfounded"; (d) in June 1985, one Walter R. May wrote a letter of complaint against one of the towing companies assigned to another part of the Expressway; another State Police sergeant conducted an investigation and discovered that the complaint was unfounded; May then admitted that he had lodged the unfounded charge at the request of Cherico; and (e) on July 18, 1985, troopers found a van with no license plates abandoned on I-287 in one of the zones not served by Cherico; the tow operator assigned to that zone said he had seen the van being towed two days earlier by a WP Towing truck driven by Cherico's son; further investigation turned up a scrap metal dealer who gave deposition testimony that on July 18, Cherico's son tried to sell the van to him, but he declined it as worthless; Cherico's son thereupon towed it away.

After detailing these incidents, the Streider Memorandum concluded as follows:

> Since Mr. CHERICO was permitted by the State Police to use his tow trucks on I-287, he has been nothing but a source of annoyance and embarrassment to the New York State Police. His constant complainant [sic] that he doesn't get enough work has been discussed with him over and over again. He has caused

> needless time expenditure by SP Hawthorne station supervisory personnel, Zone 4 supervisory personnel, Troop supervisory personnel and personnel at Division Headquarters. Many fruitless hours have been spent in investigations, interviews, and report writing, reading and reviewing. Mr. CHERICO is a potential source of embarrassment as he does not possess the proper driver's license to operate some of his equipment. Attempts by members to find Mr. CHERICO in such an unlicensed situation have thus far proved fruitless, as he utilizes other drivers.
>
> It is not within the best interests of the Division of State Police to have a person of Mr. CHERICO's ilk providing services to the users of an interstate highway patrolled solely by the State Police. His services are therefore being terminated effective close of business July 31, 1985.

Wright, in his July 26, 1985 letter to Cherico, did not offer plaintiffs a formal opportunity to contest the decision. Cherico testified that officers to whom he complained said they had been instructed not to call Cherico because his brother had been arrested for attempted murder and his family was tied to organized crime. Plaintiffs filed complaints with the State Police and the Office of the Governor. These efforts to gain reassignment were unsuccessful, and in 1986 plaintiffs commenced the present action under 42 U.S.C. 1983.

B. The Pretrial Proceedings

The original complaint alleged principally that Wright and Streider, along with other defendants against whom the action was subsequently dismissed by stipulation or order, had (a) conspired to deprive plain-

tiffs of towing business on I-287, and (b) "made scurilous [sic], defamatory and false accusations against [Cherico's] character and his family's character." The complaint asserted that defendants' actions violated plaintiffs' rights under the Due Equal Protection, and Privileges and Immunities Clauses of the Constitution. An amended complaint added allegations that defendants had terminated the assignment to Cherico because of plaintiffs' complaints and demands for more towing assignments, and it asserted that the termination therefore deprived plaintiffs of their First Amendment rights "to free speech and to petition governmental authorities for the redress of grievances." Plaintiffs sought declaratory and injunctive relief, as well as compensatory and punitive damages.

Defendants moved under Fed. R. Civ. P. 12(b)(6) to dismiss the amended complaint for failure to state a claim on which relief can be granted. District Judge Vincent L. Broderick, to whom the case was then assigned, referred the motion to Magistrate Judge Leonard A. Bernikow, who, in a Report and Recommendation dated July 15, 1988 ("Magistrate's Report" or "Report"), recommended that the motion be granted in part and denied in part. The Magistrate's Report recommended that the due process claims be dismissed on two grounds: (a) that plaintiffs had no protected property interest in towing referrals, because, inter alia, they did not have an express contract or license to provide towing services, and any implied contract would have been terminable at will; and (b) that plaintiffs failed to allege that they were deprived of a protected liberty interest in their reputation because, inter alia, the complaint did not identify the alleged "scurrilous, defamatory and false accusations" and did not allege that the accusations were publicized. The Report recommended that the equal protection claims be dismissed because the complaint did not sufficiently allege "a policy, practice or procedure violative of equal protection." As to the First Amendment claims, the Report concluded that the complaint stated a claim insofar as plaintiffs alleged that they were denied benefits in response to their statements on matters of public concern. Although the Report concluded that plaintiffs' de-

mands for more business were merely "commercial grievances" that could not form the basis of a First Amendment claim, it viewed Cherico's April 1985 personnel complaint against Wright and Streider as an exercise of the right to petition the government and concluded that plaintiffs' assertion that that complaint was a substantial or motivating factor in plaintiffs' termination presented a cognizable First Amendment claim.

In an Order dated July 14, 1990, Judge Broderick adopted the Magistrate's Report and dismissed the due process and equal protection claims, the latter without prejudice. Thereafter, plaintiffs filed two additional amended complaints asserting claims under 42 U.S.C. 1983 and 1985, the Equal Protection Clause, and the First Amendment. The final amended complaint did not include a due process claim.

C. The Decision of the Trial Court

In late 1991, the case was reassigned to then-Chief Judge Brieant, who presided over a one-day bench trial. Following the trial, Judge Brieant dismissed plaintiffs' equal protection claims but found Wright and Streider liable for violations of plaintiffs' rights under the First Amendment and the Due Process Clause.

In an oral decision from the bench, the court ruled as follows with respect to the First Amendment claims:

> [S]ome of the speech in which [Cherico] engaged was protected speech. I don't doubt that some of the speech in which he engaged was inappropriate conduct, and there comes a point where unfounded charges of not receiving [a] fair share of the work which takes up needless time and effort by supervisory people can

> become a ground for discharge, even if it is speech which otherwise might be privileged; however, the Court believes that insofar as there's any reference in [the Streider Memorandum] to the charges or the personnel complaint made, that was absolutely privileged, and the fact that it's even referred to in the report substantiates the testimony here that their reactions to it were "ambivalent."

(Transcript, December 11, 1991 ("Tr."), at 183.) In a subsequent elaboration, the court stated:

> The Court finds that — so that I can be absolutely clear about it — that the First Amendment aspect of the case having to do with the accusations he made in the context of public employment did have some slight part in the motivating factor of this decision two weeks later [sic] to terminate the services. The Court is not prepared to say it . . . was the overwhelming factor, but it was a substantial motivating factor in the resolution of this matter.

(Tr. 186.)

The principal violation found by the trial court was a deprivation of procedural due process: "the weight and strength that [the First Amendment] claim has in my view of the matter is . . . not nearly as great as the procedural due process issue . . . ." (Tr. 196.) With respect to due process, the court found that plaintiffs enjoyed protectable interests in their reputation and in their towing assignment:

> Mr. Cherico was never an employee of the state. He was, rather, a designated exclusive provider to tran-

> sients requiring towing service in this particular segment of the highway who did not have their own towing service which they wished to request.
>
> . . . . The rights that he enjoyed there, while they were purely oral, and had no termination provided in them and were indefinite as to duration, were essentially equal to a franchise, and other towing companies enjoyed theirs for many, many, many, many years.
>
> So that the Court finds that the deprivation involved here extended to a livelihood of government designation as a commercial tower to be employed by people who happened to need towing service during that portion of the highway, and they deprived him of that employment and also tarnished his individual and commercial reputation.

(Tr. 175-76.) It concluded that plaintiffs possessed "allocated rights" in the assigned section of Expressway that were "almost equivalent to employment." (Tr. 184.)

The court noted that the Streider Memorandum had detailed a number of grounds for terminating the assignment to plaintiffs and that Wright and Streider had "said that Mr. Cherico was associated with the Mafia, that he was a thief, and that he was ripping off the public by means of excess overcharges." (Tr. 174.) The court also found that

> the evidence shows that after his termination the defendant[s] advised other persons that they were not using his services for various reasons, including his disreputable character and his overcharges.

(Tr. 175-76.) In a subsequent written Memorandum & Order dated February 20, 1992 ("1992 Opinion"), the court reiterated that

> after [Cherico's] termination, defendants maligned his reputation by advising persons other than those with decision making authority that the State Police were not using Mr. Cherico's services for several reasons, including his disreputable character and his business practices.

1992 Opinion at 4. The court concluded that these statements by Wright and Streider, plus the fact that defendants did not afford plaintiffs an opportunity to explain any of the matters detailed in the Streider Memorandum, violated plaintiffs' due process rights:

> Essentially, the Court finds that the plaintiff was denied procedural due process and that he was denied an opportunity to have a hearing and an opportunity to clear his commercial and individual name of the totality of these charges of wrongdoing which are listed against him in the [Streider Memorandum].
>
> . . .
>
> In order to satisfy the constitutional standards for due process, in order to deprive this plaintiff of his allocated rights in this particular three-mile section of highway, it was necessary at the very least that either Mr. Str[ei]der or Mr. Wright would have confronted him with each of these items relied on in [the Streider Memorandum] and given him an opportunity to explain or answer to these charges. I am convinced that had this opportunity been given, some of the charges could have been explained. Probably some of them could not.

> The totality of what took place here was a denial of procedural due process involving an important right having to do with the protected interest of his good name as well as the commercial relationship, which is almost equivalent to employment.

(Tr. 183-84.)

Notwithstanding its rulings as to liability, the court concluded that "there is hardly any evidence here in support of any actual damages." (Tr. 185.) "There's no way, short of speculation, that the Court could ascertain with any certainty what his actual damages were for this loss. And furthermore, the Court can't speculate as to how long he would have continued the franchise there . . ." (Id.) Accordingly, with respect to claims under both the First Amendment and the Due Process Clause, the court ruled that plaintiffs were entitled only to nominal damages in the amount of $1, plus an award of attorney's fees.

Following the court's announcement of its oral decision, Wright and Streider promptly objected to the due process ruling, pointing out that those claims had been dismissed by Judge Broderick, with prejudice, prior to trial. The trial court responded that it was vacating Judge Broderick's order because it viewed the due process violation as clear and outrageous. After colloquy, the court offered defendants the opportunity to present evidence with respect to the due process claims.

D. The Ruling on Qualified Immunity

Wright and Streider decided not to offer evidence on the due process claims and instead moved for reconsideration on the basis that they had pleaded a defense of qualified immunity and that the claims should be dismissed on that ground. They contended that they had violated no clearly established right of which they should have known. They also sought reconsideration of the liability ruling with respect to

the First Amendment claims on the qualified immunity ground and on the ground that those claims were not proven.

In its 1992 Opinion, the court denied the motion for reconsideration, concluding that Wright and Streider were not entitled to qualified immunity:

> As early as 1972, the United States Supreme Court had recognized that a liberty interest is involved and due process required where, as here, the state terminates or fails to renew an individual's employment and accompanies that action with the publication of false or stigmatizing information. Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972); Bishop v. Wood, 426 U.S. 341, 348 (1976); Codd v. Velger, 429 U.S. 624 (1977). This Court therefore concludes that the established law in 1985 and at the time the defendants terminated plaintiffs' towing franchise based on unsubstantiated accusations, including accusations made known to persons outside the chain of command that Mr. Cherico was associated with the Mafia and a "thief", required procedural due process in the form of a hearing.

1992 Opinion at 6-7.

Judgment was entered (1) holding, inter alia, that Wright and Streider (a) denied plaintiffs procedural due process by failing to grant them a hearing before terminating their towing services, and (b) denied plaintiffs their rights to free speech and to petition the New York State Police for the redress of their grievances, and (2) ordering Wright and Streider to pay plaintiffs $1 in damages plus S22,700 as reasonable counsel fees.

Wright and Streider have appealed from so much of the judgment

as held them liable to plaintiffs; plaintiffs have cross-appealed from so much of the judgment as awarded them only nominal damages.

II. DISCUSSION

On their appeal, Wright and Streider contend principally 7 that the trial court erred (1) in ruling that plaintiffs were deprived of their First Amendment and due process rights, and (2) in rejecting defendants' qualified immunity defense to the due process claims. For the reasons below, we conclude that the First Amendment claims and certain of the due process claims should have been dismissed on the merits and that, even if there was a violation of plaintiffs' due process rights, defendants had qualified immunity. Having reached these conclusions, we dismiss plaintiffs' cross-appeal on the question of damages as moot.

A. The First Amendment Claim

A public employer enjoys wide latitude in managing its Connick v. Myers, 461 U.S. 138, 146 (1983), and therefore has "a legitimate interest in regulating the speech of its employees that differs significantly from its interest in regulating the speech of people in general," Piesco v. City of New York. Dept. of Personnel, 933 F.2d 1149, 1155 (2d Cir.), cert. denied, 112 S. Ct. 331 (1991); see Connick v. Myers, 461 U.S. at 140; Pickering v. Board of Education, 391 U.S. 563, 568 (1968). The public employer's right to discharge an employee for exercising his First Amendment right to freedom of speech, even if the employee could have been discharged without cause, is nonetheless circumscribed. See Rankin v. McPherson, 483 U.S. 378, 383-84 (1987); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 283-84 (1977); Perry v. Sindermann, 408 U . S . 593, 597-98 (1972) . "The determination whether a public employer has properly discharged an employee for engaging in speech requires 'a

balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs G through its employees.'" Rankin v. McPherson, 483 U.S. at 384 (quoting Pickerina v. Board of Education, 391 U.S. at 568).

Accordingly, a public employee who seeks to recover on the ground that he has been discharged because of the exercise of his First Amendment speech rights must establish, as an initial matter, that his speech may be "'fairly characterized as constituting speech on a matter of public concern.'" Rankin v. McPherson, 483 U.S. at 384 (auoting Connick v. Myers, 461 U.S. at 146); see Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775, 781 (2d Cir.), cert. denied, 112 S. Ct. 657 (1991). "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Connick v. Myers, 461 U.S. at 146.

Certain categories of speech are less likely than others to involve matters of public concern. For example, "commercial" speech, i.e., speech that merely proposes commercial transactions, see, e.g., City of Cincinnati v. Discovery Network. Inc., 61 U.S.L.W. 4272, 4275 (U.S. Mar. 24, 1993); Board of Trustees v. Fox, 492 U.S. 469, 473-74 (1989); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council. Inc., 425 U.S. 748, 762 (1976), may have little or no relevance to matters of public concern. See, e.g., id. at 764 ("not all commercial messages contain the same or even a very great public interest element"). See also Board of Trustees v. Fox, 492 U.S. at 477 (commercial speech enjoys "'a limited measure of protection'" (quoting Ohralick v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978))); Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 562-63 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

Within this framework, a police department's employment policies, for example, are a matter of public concern, see Piesco v. City of New York, Dept. of Personnel, 933 F.2d at 1157; but an assistant district attorney's personal desire for a particular assignment is not a matter of public concern, see Connick v. Myers, 461 U.S. at 148; see also id. at 149 ("First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs"); Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d at 781 (medical resident's complaints regarding her treatment in residency program did not address matters of public concern). "[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Connick v. Myers, 461 U.S. at 147.

Once the employee establishes that he has spoken as a citizen on a matter of public concern, he must also establish that that speech was at least a "substantial" or "motivating" factor in the discharge. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. at 287. If the employee fails to prove either this causation element or the public-concern element, his First Amendment claim must fail.

If the employee carries these burdens, the employer can then escape liability in either of two ways. First, the employer is entitled to prevail if it demonstrates that it would have made the same employment decision in the absence of the protected conduct:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to re-

> hire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 286; see also id . at 285-87; Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d at 780-81. Second, even if the employer does not establish that it would have discharged the employee in the absence of the protected conduct, it may nonetheless prevail if it can show that the employee's conduct interfered with the employer's "effective and efficient fulfillment of its responsibilities to the public." Connick v. Myers, 461 U.S. at 150. "[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression," id., and the court must thus perform a balancing analysis, measuring, inter alia, the extent to which the employee's speech touched upon matters of public concern against the extent to which the employee's conduct interfered with the functioning of the workplace, see id. at 150-52; Rankin v. McPherson, 483 U.S. at 389. Even as to an issue that could arguably be viewed as a matter of public concern, if the employee has raised the issue solely in order to further his own employment interest, his First Amendment right to comment on that issue is entitled to little) weight in the balancing analysis. See, e.g., Connick v. Myers, L 461 U.S. at 154; Piesco v. City of New York, Dept. of Personnel, 933 F.2d at 1157 (explaining cases).

The First Amendment right to petition the government for a redress of grievances, which is "an assurance of a particular freedom of expression," McDonald v. Smith, 472 U.S. 479, 482 i (1985), is "generally subject to the same constitutional analysis" as the right to free speech, Wayte v. United States, 470 U.S. 598, 610 n.11 (1985). Thus, right-to-petition claims are also governed by the above interest-balancing principles. See Schalk v. Gallemore, 906 F.2d 491, 498 (10th Cir. 1990) (per curiam); Gray v. Lacke, 885 F.2d 399, 412 (7th Cir. 1989), 494 U.S. 1029 (1990); Day v. South Park Independent School District, 768 F.2d 696, 701 (5th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

In the present case, although Cherico was not an employee of the State Police and had no formal franchise from or contract with the state, we will assume for purposes of First Amendment analysis that, as the trial court ruled, the assignment to Cherico was tantamount to employment. On this hypothesis, the trial court could properly find plaintiffs' First Amendment claims meritorious only if (1) Cherico's speech constituted comments upon a matter of public concern, (2) that speech was a substantial or motivating factor in defendants' termination of WP Towing's highway assignment, (3) defendants failed to show that they would have terminated that assignment even in the absence of that speech, and (4) defendants failed to show that the State Police interest in performing its duties outweighed Cherico's interest in speaking on matters of public concern. As discussed below, most of Cherico's speech failed to meet the first of these criteria, and the court's findings establish that defendants would have terminated Cherico's assignment even in the absence of the speech that did touch upon matters of public concern.

The vast majority of Cherico's communications to the State Police consisted simply of demands and complaints seeking an increase in towing referrals to WP Towing. These communications stated private commercial grievances that do not appear to relate to any matter of political, social, or other concern to the community and hence could not provide a basis for recovery. Even if they had any political or social relevance, the weight properly accorded them would have been minimal and Cherico's interest in soliciting more work would plainly have been outweighed by the interest of the State Police in allocating its resources to other functions. It was indisputable that Cherico's "constant" commercial demands had

> caused needless time expenditure by SP Hawthorne station supervisory personnel, Zone 4 supervisory personnel, Troop supervisory personnel and personnel at Division Headquarters. Many fruitless hours have been spent in investigations, interviews, and report writing, reading and reviewing.

(Streider Memorandum.) That assessment was supported by Cherico's own testimony that one Troop K captain had "spent four days in my place of business looking at the operation" (Tr. 25), and that Cherico had made so many assignment complaints that he could not even remember whether to WP Towing had occurred before or after he made the personnel complaint (see Tr. 44 ("I don't recall, because I made numerous complaints.")). Thus, the trial court observed that

> there comes a point where unfounded charges of not receiving [a] fair share of the work which takes up needless time and effort by supervisory people can become a ground for discharge, even if it is speech which otherwise might be privileged.....

(Tr. 183.) Plainly the interest of the State Police in not allocating inordinate amounts of time to dealing with Cherico's demands for more work outweighed plaintiffs' interest in pursuing their private commercial goals. Plaintiffs' First Amendment claims could not be sustained on the basis of these demands.

Cherico's April 1985 personnel complaint against Wright and Streider, however, alleging that they mischaracterized Cherico as a dishonest operator and as having ties to organized crime, potentially enjoys a different status, for a state police corps' performance of its duties is a matter of public concern, and alleged defamation by state police officers of a citizen with whom the police department is doing business may well be a matter of interest to the community. Although Cherico's First Amendment t interest in filing his short-lived personnel complaint would be weak if, as the trial record strongly suggests, he took that action solely to obtain additional towing referrals, the trial court did not err in ruling that the personnel complaint did at least minimally touch upon a matter of public concern.

The trial court also perhaps did not clearly err in finding that Cherico's personnel complaint against Wright and Streider was a "sub-

stantial motivating factor" in defendants' decision to terminate the assignment to WP Towing. We express some uncertainty as to this element because, as discussed below, the court found that the personnel complaint had caused defendants to be "ambivalent," that the role of Cherico's personnel complaint in that decision was "slight," and that the decision to terminate was based on other factors.

Even accepting, however, the proposition that Cherico's personnel complaint involved a matter of public concern and was a "substantial motivating factor" in defendants' decision to terminate WP Towing's assignment, we conclude that the trial court's analysis was incomplete, for the court did not go on to consider whether or not defendants would have terminated that assignment even had there been no personnel complaint. The court's other findings, which are amply supported by the evidence, compel the conclusion that defendants would indeed have terminated Cherico's towing referrals even in the absence of his short-lived personnel complaint. There was no dispute that Cherico's repeated - demands for more assignments were one reason for defendants' decision to terminate the *assignment* to plaintiffs. The complaint so alleged, and the trial court so noted ("plaintiff[]s claim that . . . the complaints that were made about the alleged unfair assignment made verbally by Mr. Cherico were a substantial motivating factor in the decision" (Tr. 173-74)). The civilian complaints against WP Towing, the discovery that Cherico had procured an unfounded complaint against one of his competitors, L and the belief that Cherico was connected to organized crime were also plainly factors that caused defendants to terminate the 3 towing assignment. Indeed, at trial, these factors and his I chronic complaints were at first the only reasons proffered by Cherico for the termination; the proposition that his personnel complaint had played any role in the termination had to be dragged out of him by his attorney's leading question:

> Q. Mr. Cherico, why do you believe you were removed from Interstate 287?

A. I believe I was removed because they said I was a criminal, my family was no good, and that I was ripping the public off.

Q. What, if any, effect did your complaints-you believe your complaints had to do with it?

A. I don't understand the question.

Q. The complaints that you made had something

What, if any, effect do you believe your complaints had?

A. I guess they just didn't want to be bothered in answering any of the complaints.

Q. Is it your contention in this lawsuit that the complaint you made against Sergeant Strieder [sic] and Lieutenant Wright had something to do with it?

A. Yes.

(Tr. 26-27.) Thus, Cherico himself appeared to be of the view that the towing assignment was terminated because defendants believed he was dishonest, was connected to organized crime, and wasted official time with his demands for more work. Consistent with the tenor of this testimony, the court found that plaintiffs' filing of the personnel complaint was not an "overwhelming factor" but only played "some slight part in the motivating factor" for the termination. (Tr. 186.) We note also that the court found that the role of the personnel complaint was "slight" even while apparently believing that the termination of WP Towing's assignment occurred only "two weeks" (id.) after the

personnel complaint was made. That belief was clearly erroneous in light of the stipulated facts that the complaint was made in April and the termination occurred in July. The complaint was withdrawn just days after lodged, and the actual more-than-three-month interval between the short-lived complaint and the assignment termination, together with intervening conduct by or attributable to Cherico (i.e., continued demands for more assignments, the solicitation of a false consumer complaint against one of his competitors, and the dumping of a worthless van in a competitor's territory) suggests that the role of the personnel complaint was even less than "slight." Indeed, in its 1992 Opinion, the court stated that Wright and Streider had

> terminated plaintiffs' towing franchise based on unsubstantiated accusations, including accusations made known to persons outside the chain of command that Mr. Cherico was associated with the Mafia and a "thief."

1992 Opinion at 7. This finding, together with the findings that the personnel complaint had caused defendants to be "ambivalent" and its role in the decision to terminate was "slight," all of which are amply supported by the record, required the conclusion that defendants would have terminated the assignment to Cherico even had there been no personnel complaint.

Accordingly, we conclude that, even if plaintiffs' status were elevated to the level of state employee or franchisee, the trial court erred in ruling that plaintiffs' First Amendment rights had been violated.

B. The Merits of the Due Process Claim

In order to succeed on a claim of deprivation of procedural due process, a plaintiff must establish that state action deprived him of a

protected property or liberty interest. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 332 (1976). To have a property interest in a public benefit, a plaintiff "must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v.Roth, 408 U.S. 564,577 (1972). Such property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Id.

Under New York law, a contract for services that makes no specific provision for duration is presumed to be terminable at will. See e.g., Murphy v. American Home Products Coro., 58 N.Y.2d 293, 305, 461 N.Y.S.2d 232, 237 (1983) (employment contract); Haines v. City of New York, 41 N.Y.2d 769, 773, 396 N.Y.S.2d 155, 158 (1977) ("exclusive agency, distributorship, or requirements contracts which have been analogized to employment contracts"). An interest that state law permits to be terminated at the whim of another person is not a property right that is protected by the Due Process Clause. See, e.g., Bishop v. Wood, 426 U.S. 341, 345-47 (1976); Goetz v. Windsor Central School District, 698 F.2d 606, 608-09 (2d Cir. 1983).

In the present case, the trial court appears to have found that plaintiffs' towing assignment constituted a property right that was protected by the Due Process Clause. It found that "[t]he rights that [plaintiffs] enjoyed there, while they were purely oral, and had no termination provided in them and were indefinite as to duration, were essentially equal to a franchise" (Tr. 176); that "the deprivation involved here extended to a livelihood of government designation" (id.); and that plaintiffs' "allocated rights in [a] particular three-mile section of highway," constituted a "commercial relationship, which is almost equivalent to employment" (Tr. 184). The record does not support the conclusion that these towing assignments were property rights protected by due process. The parties stipulated that the Troop K system for assigning segments of I-287 to towing operators was "not specifically authorized by, or codified in any statute or in i any regulation of

the State Police," that these assignments were "not contractual in nature," that the assignments were "not made or awarded based on bid[s]," and that the towing operators thus assigned were "not specifically licensed or issued permits by the State Police to operate or to provide services under the Troop K tower/wrecker dispatch system." (Stipulation ¶¶ 9, 13) The informal arrangement resulting from the assignment system contained no specificity as to the duration of the relationship and whatever an individual towing operator's hopes or expectations, the record showed that the assignment could be, as it was once for Cherico himself in 1984, as short as two days. Under New York law, therefore, this plainly was a relationship that was terminable at will Accordingly, regardless of their unilateral hopes or expectations, plaintiffs had no cognizable property interest in continued towing referrals on I-287, and the mere termination of their status thus did not deprive them of a due-process-protected interest.

In addition, we should note that to the extent that the trial court relied on its finding that defendants maligned Cherico's reputation after Cherico's termination, see Tr. 175-76; 1992 Opinion at 4, that conduct was an insufficient basis for a finding of due process violation. Injury to reputation alone, even when inflicted by a state official, does not deprive an individual of a liberty or property interest protected by due process, see Paul v. Davis, 424 U.S. 693, 712 (1976), and hence, the defamation of a former public employee after the termination of the employment relationship does "not . . . trigger due process rights," Gentile v. Wallen, 562 F.2d 193, 198 (2d Cir. 1977). Rather, "some 'stigma plus' is required to establish a constitutional deprivation." Easton v. Sundram, 947 F.2d 1011, 1016 (2d Cir. 1991), cert. denied, 112 S. Ct. 1943 (1992).

We think the district court correctly viewed plaintiffs as having sought to prove "stigma plus," for the potential injury to their reputation stemming from defendants' characterization of Cherico as dishonest or as related to organized crime, combined with his status as an exclusive assignee of towing rights on a portion of the Express-

way, may have sufficed to give plaintiffs a liberty interest that could not properly be terminated without a hearing. Even a person who has no property right in continued employment may have a due-process-protected liberty interest in not being dismissed "based on charges 'that might seriously damage his standing and associations in his community' or that might impose 'on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities.'" Brandt v. Board of Cooperative Educational Services. Third Supervisory District. Suffolk county. New York, 820 F.2d 41, 43 (2d Cir. 1987) (quoting Board of Regents v. Roth, 408 U.S. at 573). The right not to be so defamed is not limited to situations involving termination of employment; it extends as well to 2 defamation occurring in the course of "'termination of some other legal right o[r] status.'" Easton v. Sundram, 947 F.2d at 1016 (quoting Neu v. Corcoran, 869 F.2d 662, 667 (2d Cir.), cert. denied, 493 U.S. 816 (1989)).

To demonstrate such a due process violation, however, the plaintiff must also establish that the stigmatizing charges were publicized. See Bishop v. Wood, 426 U.S. at 348-49; Brandt v. Board of Cooperative Educational Services. Third Supervisory District. Suffolk County. New York, 820 F.2d at 43. Recovery is limited "to those instances where the stigmatizing charges made in the course of discharge have been or are likely to be disseminated widely enough to damage the discharged employee's standing in the community or foreclose future job opportunities." Id. at 44.

Here, even assuming arguendo that plaintiffs established that their terminable-at-will status was sufficient to constitute the "plus" element of the "stigma plus" standard, judgment in their favor was inappropriate since the trial court did not make a finding that there had been any dissemination of defendants' stigmatizing statements sufficient to affect plaintiffs' standing in the community or to foreclose future job opportunities. Nor would such a finding have been supported by the record, for there appears to be no evidence that defen-

dants made the critical statements to the public in general, or to any member of the public in particular, or to any person inquiring as to plaintiffs' towing operations. Indeed, Wright's letter notifying plaintiffs of the termination stated that if a motorist specifically requested its services, WP Towing would be called. With respect to publication, the trial court found only that defendants made the statements to other police officers who were not decisionmakers as to towing assignments. Given that the primary function of a police force is law enforcement, we doubt that police officers' informing other police officers, even those without authority to make employment decisions, that a given individual has been accused of being dishonest or is believed to have ties to organized crime can constitute a sufficient publication to warrant a ruling that the individual's liberty interest has been impermissibly infringed.

We need not, however, decide whether communication from police officer to police officer constitutes such an infringing publication, for it is quite clear that defendants were entitled to qualified immunity with respect to this claim.

2. The Qualified Immunity Defense

The doctrine of qualified immunity shields state officials from liability for damages if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known," Harlow v. Fitgerald, 457 U.S. 800, 818 (1982), or even where the rights were clearly established, if it was objectively reasonable for defendants to believe that their acts did not violate those rights, see Anderson v. Creighton, 483 U.S. 635, 638 (1987); Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987). An official does not have such immunity where the "contours of the right" were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. at 640; see, e.g., Bass v. Coughlin, 976 F.2d 98, 99 (2d Cir. 1992) (per curiam);

Vasbinder v. Ambach, 926 F.2d 1333, 1341 (2d Cir. 1991). To determine whether a particular right was clearly established at the time defendants acted, a court should consider:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991), cert. denied, 112 S. Ct. 1565 (1992).

There are two facets to the present case requiring that defendants be accorded qualified immunity against plaintiffs' due process claims. First, because WP Towing's exclusive assignment as towing operator for part of I-287 was a nontraditional relationship and was terminable at will, it could not have been clear whether that assignment provided plaintiffs with a status sufficient to give them a due-process-protected liberty interest in avoiding termination without a name-clearing hearing. Second, even if this question were answered in the affirmative, there remains the question whether the communication by one police officer to another police officer of a charge that a given individual has performed dishonestly or of the belief that the individual has ties to organized crime can constitute a publication sufficient to violate the individual's liberty interest. This Court has never answered that question; we are not aware of any other court that has answered it; and as indicated above, we would be surprised to find it answered in the affirmative.

In sum, defendants were entitled to qualified immunity with respect to plaintiffs' claim that the *assignment* to WP Towing could not, consistent with due process, be terminated without a hearing.

CONCLUSION

We have considered all of plaintiffs' contentions in opposition to the appeal and have found them to be without merit. For the foregoing reasons, the judgment of the district court in plaintiffs' favor is reversed. The cross-appeal is dismissed as moot. Judgment shall be entered dismissing the complaint.

White Plains Towing Corp. v. Patterson, Nos. 92-7617, -7663

LUMBARD Circuit Judge, concurring in part and dissenting in part:

I concur with the majority as to the due process claim, but dissent as to the First Amendment claim.

In reversing judgment for the plaintiffs, the majority finds that the district court failed to apply the proper legal standard. See Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977) (employer may avoid liability if it demonstrates by a preponderance of the evidence that it would have reached the same decision absent the protected conduct). The majority nevertheless concludes that the district court's findings "compel" rejection of the plaintiffs' claim. I disagree.

Defendants must prove that they would have terminated Cherico even absent the personnel complaint. In light of the district court's finding that Cherico's complaint was a "substantia' motivating factor" in the defendants' decision to cancel the referrals, I cannot conclude, on this record, that defendants have met their burden of proof. Therefore, I believe the more appropriate course is to remand this matter to the district court for further findings.

Cherico - Rebuttal Cross (Turbin)
pages 170-187

there's any proof of any lost net profits. All we had was an estimate of how many road calls that were made.

MR. WOLIN: Unfortunately, the records were unavailable, your Honor, so I had to do the best I had to do.

THE COURT: Well, anything else?

MR. SHAMIS: No, your Honor.

THE COURT: All right. I think court should review this matter at this time and make my findings of fact and conclusions of law.

The Court makes the following findings of fact and conclusions of law after trial.

After I finish I will ask counsel to make any further or other or additional requests that you may have.

This case essentially rests on the documentation, and the court finds that for a period of time prior to July 31, 1985, at a time when this plaintiff Donald Cherico doing business through a corporate business known as White Plains Towing Corporation and also Don's Towing located on Ferris Avenue in White Plains, had been assigned an exclusive opportunity between exits 9 through 12, a length of four miles of what is commonly known as the Cross Westchester Expressway. Mr. Cherico is no longer in the towing business, being engaged now as an over-the-road truck driver and he went out of business.

At the time in question he had other places where he was authorized to render towing. The testimony here shows, and I find, at least as to this particular part of the jurisdiction of Troop K, it was the practice for the sergeant to make designations or assignments of exclusive opportunity to service particular lengths of the Interstate 287.

In some other parts of the state it's done differently. Other highway authorities, such as the thruway and the parkway and so forth, may have different proceedings for doing it, as the record indicates.

However, prior to July 31, 1985, I-287 in this county was divided into three sections for tow-truck purposes. Exit 1 through 6, consisting of four miles was assigned to Larry Paovella, doing business as Larry's Towing. And exit 6 through 9, consisting of three miles, was assigned to Don Cherico doing business as Don's Towing.

I incorrectly stated the exits a moment ago. The exits 9 through 12, consisting of four miles, which I mentioned earlier as being assigned to plaintiff, were in fact assigned to Douglas Tricarico doing business as Doug's Towing. These assignments had continued for many, many years. They were made initially by whatever means appeared appropriate to the sergeant making the designation.

The effect of the designation was that if there was a disabled vehicle or an accident within the mileage allocated to the particular towing company, unless the owner of the vehicle requested a different towing concern by name, the designated towing company was directed to do the work. This meant that the designated towing company or assigned towing company for that mileage got substantially all the accidents or disabled vehicles because most of the traffic is transient and the towing concern has to be near the scene so that, in effect, as . practical matter, that meant they had all the work.

The arrangement was such that, once appointed or designated, the exclusive towing company for a particular length of the highway had

an expectation of continuing in that office indefinitely and many of them did.

The court considers first, because it's the simplest, the so-called Equal Protection violation involved here. I don't find that there is, under these facts, any violation whatsoever of the right of equal protection. Essentially, the plaintiff's contention is that the defendants distributed the towing referrals in an arbitrary manner that was not related to a legitimate state interest, and apparently after these designations were made there's some reason to believe that all of the tows within the designated areas did not necessarily go to the plaintiff.

The rules were so rigidly enforced that on circumstances where a towing company who did not have that particular milease had hooked up to a disabled vehicle, a trooper would regularly order him to drop it and allow the other one to take the work.

This may be an example of bad government and it may be that the State of New York should have some better or less arbitrary method to provide this essential public service, and the testimony here shows that in other places it's done differently, and by other highway controlling authorities it's done differently, but that's a matter for local governmental choice and the authorities of the state can do it in this fashion if they wish to do so. And the mere fact that it may not be ideal does not make it an equal protection violation. So the court declines to find any liability based on a violation of rights under the Equal Protection clause.

The situation is somewhat different as to the balance of the allegations in this situation. The plaintiff's claim that the lodging of a grievance on April 19, 1985, was a substantial or motivating factor in the defendant's decision to terminate the services, and also the complaints that were made about the alleged unfair assignment made verbally by Mr. Cherico were a substantial motivating factor in the decision.

This Court is relying essentially on, in discussing the First Amendment claim, which I'll take up first on the opinion of Magistrate Judge Bernikow which was rendered in this matter, and I think it would unduly prolong my decision if I were to simply read into the record the cases cited by him, not only on the First Amendment claim but also on the procedural due process claim here which the Court regards as a significant claim.

The other claim which the Court considers is whether the plaintiff has made out a claim based on a violation of their right to procedural due process. And essentially, the allegations are that Mr. Cherico testified and I find that the defendants Wright or Strieder, both of them, had allegedly said that Mr. Cherico was associated with the Mafia, that he was a thief, and that he was ripping off the public by means of excess overcharges. That testimony is corroborated and indeed in large part admitted. This Court relies on Walentas v. Lipper, 862 F.2d 414 (2d Cir. 1988) in which the Court of Appeals has held that it's clear where a person's good name, reputation, honor or integrity is at stake because of what the Government is doing to him, a protectable liberty interest may be implicated that brings procedural due process in the form of a hearing to clear his name. However, damage to one's reputation alone is not enough to implicate due process protection. Relying, of course, on Paul v. David, 424 U.S. 693 (1973).

The Walentas case the Second Circuit went on to explain something more, such as discharge from governmental employment must accompany the alleged defamation. The Second Circut has explained that a government employee's liberty interest is implicated where the Government dismisses him based on charges that might seriously damage his standing and associations in the community or that might impose on him a stigma or other disability, yet forecloses his freedom to take advantage of other employment opportunities. The citation is to the S&D Maintenance case, 844 F.2d, quoting the Board of Regents v. Roth. And this liberty interest is recognized both where an individual is employed by the state or where the individual seeks employ-

ment with the state.

Mr. Cherico was never an employee of the state. He was, rather, a designated exclusive provider to transients requiring towing service in this particular segment of the highway who did not have their own towing service which they wished to request.

And the evidence shows that after his termination the defendant advised other persons that they were not using his services for various reasons, including his disreputable character and his overcharges. The rights that he enjoyed there, while they were purely oral, and had no termination provided in them and were indefinite as to duration, were essentially equal to a franchise, and other towing companies enjoyed theirs for many, many, many, many years.

So that the Court finds that the deprivation involved here extended to a livelihood of government designation as a commercial tower to be employed by people who happened to need towing service during that portion of the highway, and they deprived him of that employment and also tarnished his individual and commercial reputation.

We're now going to mention what happened insofar as concerns the procedures for termination. The Court relies on Exhibit C here, which is a memorandum from Zone Sergeant Strieder, a defendant here, addressed to Major Hook, troop commander, who is not a defendant. The record shows that the memorandum was dated July 26, 1985, and I believe that that is the day on which it is created and it's the first day upon which it reached the possession of defendant Lieutenant Wright. Lieutenant Wright's memorandum, which is Exhibit B, is also dated July 26, 1985. Both documents are dated as from Troop K station in Hawthorne.

The memorandum of defendant Wright shows that he wrote to Major Hook on the same day, July 26, on the subject of Don's Towing and he states that he has reviewed the report of Strieder, concurs in it

fully and n I have this date sent a certified letter, a return receipt requested, to Mr. Cherico advising him of my decision. Copy attached."

The Court regards Strieder and Wright together as being the decision makers. It is true this apparently was reviewed through the entire chain of command, but in essence that most of that review was after the fact review because on the very day he received it, he mailed the letter terminating the rights of Don's Towing or plaintiff Cherico, as he's called.

Exhibit C gives the historical background and points out that the other two exclusive persons granting towing during this in the course of this highway had no complaints during the first six months of the year and that those persons had not complained to the state troopers.

The report then goes on to note the so-called Royal Insurance Company claim or dispute, and this involves allegations of misconduct on the part of Cherico in connection with a particular incident involving a cargo of a semi trailer at Port Chester. There is evidence in the trial record here which would support the idea that there was an overcharge, and there's also evidence in the trial record here which would support the contention by the plaintiff that the charges, as finally compromised at $13,000, were fair and reasonable and indeed he claims he reduced the bill from $15,495 to $13,000.

The report merely states the receipt of the written complaint in October 18, 1984, from Royal Insurance Company. There's no credible evidence whatsoever in this trial record that either Mr. Strieder or Mr. Wright discussed that complaint with Cherico at any time prior to July 26 or told him at any time prior to July 26 when the decision was made that this complaint was being relied on as a possible basis for termination of his towing franchise.

The next item mentioned has to do with the January 7, 1985, complaint from Mr. Szkred, and that has to do with the $5 sign and the

$10-a-day charge. The plaintiff has explained it. The record does not support any inference whatever that either Mr. Strieder or Mr. Wright discussed this particular complaint or issue with Mr. Cherico any time prior to July 26, 1985, or gave him an opportunity to explain the complaint from his point of view.

His current contention is that, if asked, he would have said that the $5 a day sign referred to the parkways which had an administrative limit on the charge. It did not apply to work not on the parkway.

The report then goes on and mentions a so-called personnel complaint against Wright and Strieder in which Cherico alleged that they had impuned his reputation by charging that he was connected with organized crime.

The report goes on to say that on April 22, 1985, the complaint was retracted and the matter was closed as unfounded.

There is no independent finding as to whether or not it was unfounded or anything of that sort.

The report continues to point out that apparently the plaintiff here had agitated a customer by the name of Walter May to make a complaint against Doug's Towing service and that was an unfounded complaint. It's said that Mr. May told the reporting officer that the letter of complaint was written at Cherico's request.

Here, again, there's no evidence that prior to July 26, 1985, Mr. Cherico was notified of this matter or given an opportunity to reply or explain as to whether he, in fact, had caused Mr. Walter May to file an unfair or unfounded complaint.

The next item listed has to do with a July 18, 1985, abandonment of a worthless van in that section of I-287 serviced exclusively by

Doug's Towing. It was ascertain as a result of an official investigation that Doug had contended that the van had been observed in the possession of Don Cherico, Jr., and being towed from the Brookfield Autowreckers in Elmsford.

Further investigation indicated that Don Cherico, Jr., had attempted to sell the van to the Brookfield Autowreckers and had been told that it was of no commercial value. The report sets forth that Trooper Plaia telephonically contacted Don Cherico who denied any knowledge of the van.

The Court infers from this that Doug's Towing towed the van, and since the van had no plates, apparently nobody ever bothered to find out who the owner of record was, it would be impossible for Doug's Towing to be paid for that particular tow job. A deposition was obtained from the proprietor of Brookfield Autowreckers, but there's no indication that this issue was ever — the fact of the deposition was ever made known to Cherico on or before July 26, 1985.

The report says that "perhaps there's not enough evidence to sustain a conviction in court. It is a logical conclusion that in order to dispose of the van, which was of no value, was purposely abandoned in Doug's Towing area in I-287."

Here, again, the logic of this may be open to question and the matter of the van was never fully investigated, nor was Mr. Cherico, the plaintiff, ever informed that this little game with the van was being relied upon as a basis to terminate his franchise for towing.

The report notes that the plaintiff is allowed to tow along with other wreckers in jurisdictions such as the City of White Plains and Elmsford and so forth.

The report concludes with the following language which speaks volumes.

"Since Mr. Cherico was permitted by the State Police to use his tow trucks on I-287, he has been nothing but a source of annoyance and embarrassment to the New York State Police. His constant complaint that he doesn't get enough work has been discussed with him over and over again. He has caused needless time expenditure by SP of Hawthorne station supervisory personnel, zone four supervisory personnel, troop supervisory personnel and personnel division headquarters. Many fruitless hours have been spent in investigations, interviews and report writing, reading and reviewing. Mr. Cherico is a potential source of embarrassment as he does not possess the proper driver's license to operate some of his equipment."

I interrupt the quotation that it is apparently conceded that's not true and no evidence to support that.

The report goes on the say. "Attempts by members to find Mr. Cherico in an unlicensed situation have thus far proved fruitless and he utilizes other drivers."

The court finds it hard to say how utilizing other drivers can be inappropriate or a basis for discharge.

The report concludes with the following interesting sentence: "It is not within the best interests of the division of State Police to have a person of Mr. Cherico's ilk providing services to the users on interstate highway patrolled solely by the State Police. His services are, therefore, being terminated effective close of business July 1, 1985."

The Court is taking the word "ilk" as being a word with its ordinary dictionary meaning and having a rather severe perjorative overtone. A review of this report — and I might also say we have a Hermance incident, and a full investigation of that would apparently have resulted in a finding that there was no wrongdoing on the part of the plaintiff in connection with the Hermance incident. The Hermance incident is not related in Strieder's report but was known to the defen-

dant Wright.

Essentially, the Court finds that the plaintiff was denied procedural due process and that he was denied an opportunity to have a hearing and an opportunity to clear his commercial and individual name of the totality of these charges of wrongdoing which are listed against him in the July 26 report.

The Court also finds that some of the speech in which he engaged was protected speech. I don't doubt that some of the speech in which he engaged was inappropriate conduct, and there comes a point where unfounded charges of not receiving fair share of the work which takes up needless time and effort by supervisory people can become a ground for discharge, even if it is speech which otherwise might be privileged; however, the Court believes that insofar as there's any reference in this report to the charges or the personnel complaint made, that was absolutely privileged, and the fact that it's even referred to in the report substantiates the testimony here that their reactions to it were n ambivalent."

In order to satisfy the constitutional standards for due process, in order to deprive this plaintiff of his allocated rights in this particular three-mile section of highway, it was necessary at the very least that either Mr. Strieder or Mr. Wright would have confronted him with each of these items relied on in Exhibit C and given him an opportunity to explain or answer to these charges. I am convinced that had this opportunity been given, some of the charges could have been explained. Probably some of them could not.

The totality of what took place here was a denial of procedural due process involving an important right having to do with the protected interest of his good name as well as the commercial relationship, which is almost equivalent to employment. Although the actual employers are the owners of the disabled vehicles, the Court is not making any reliance on the alleged episode where he was hired to tow

for the repair contractor the following year. Presumably that information is permissible to show some kind of attitude, but the weight to which it is entitled would be very light.

The fact that they told him the reasons after the termination was done does not satisfy the need for due process of a procedural nature before termination, which is required by the United States Constitution and it does not satisfy his opportunity to clear his commercial and individual name, which he's entitled to have under the Constitution.

Now, the Court is very much limited as to the relief, if any, which can be granted here. The case is not at proper case for injunctive relief for many reasons, not the least of which is he's no longer in the towing business. And there is hardly any evidence here in support of any actual damages- Mr. Cherico testified that during a nine-month period he Serviced approximately five or six hundred road calls because of the rights which he had been given by Troop K. Then he testified he was paid somewhere between $40 for a simple tow, for $13,000 in the case of the atomic fillers which rolled over.

The trial has led to no bills or receipts documenting this and this would be gross revenue. During the period mentioned plaintiff had a legitimate towing business going on on other roads and highways using the same equipment and the same personnel. There's no way, short of speculation, that the Court could ascertain with any certainty what his actual damages were for this loss.

And furthermore, the Court can't speculate as to how long he would have continued the franchise there and I can't speculate as to what he could have done or should have done to mitigate his damages.

The Court recognizes there is apparently a large number of people in the towing industry in this locality, many of them do not have exclusive rights to particular highways. We can infer that all of them

are making a living.

What it really comes down to is that with respect to the procedural due process claim and the matter of the First Amendment infringement here, the Court is limited to the award of nominal damages. The Court finds that — so that I can be absolutely clear about it — that the First Amendment aspect of the case having to do with the accusations he made in the context of public employment did have some slight part in the motivating factor of this decision two weeks later to terminate the services. The Court is not prepared to say it is was the overwhelming factor, but it was a substantial motivating factor in the resolution of this matter.

Some of the other claims mentioned in Exhibit C are somewhat stale. The overcharges which aren't really documented anyway go back to 1984 and it's doubtful that the Hermance one was even known to them and he had been exonerated as to that.

And as far as the continuous complaining about the allocating of the work, this Court does not believe that's the most unusual thing in the world. The testimony of Mr. Patterson shows it happens elsewhere. If that was all that was involved, they could handle it. At some point they formed a dislike here, which is quite apparent, and it's reflected in referring to this plaintiff as n a person of Mr. Cherico's ilk. " And that kind of a statement, in light of allegations previously mentioned, carries a connotation with it which does suggest to the Court constitutional violations is one of a serious nature and the Court must uphold his rights in the matter although no damages can be assessed beyond nominal damages.

Now, those constitute the findings of fact and conclusions of law of the Court after trial. The Court adopts the stipulation of undisputed facts. If there's an additional item which the Court has to cover so you can all have a complete trial record, the Court is prepared to accept a further request to find.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WHITE PLAINS TOWING CORP. d/b/a,
DON'S TOWING and DONALD CHERICO,

Plaintiffs,

-against-

JAMES G. PATTERSON, HAROLD J. WRIGHT and E.P. STREIDER,

Defendants.

Case No.: 86 Civ. 2862 (CLB)

FINAL JUDGMENT

The issues in the above entitled action having duly come on for trial before the Honorable Charles L. Brieant, United States District Judge, without a jury, at the United States Courthouse, Southern District of New York at the Courthouse thereof located at 101 East Post Road, White Plains on the 11th day of December, 1991, and the Plaintiffs, WHITE PLAINS TOWING CORP. d/b/a DON'S TOWING and DONALD CHERICO, having appeared by their attorney, ALAN E. WOLIN, and the Defendants, JAMES G. PATTERSON, HAROLD J. WRIGHT and E.P. STREIDER, having appeared by their attorney, MYRON P. SCHAMIS, Assistant Attorney General, and the issues having been duly tried, and the Court having after due deliberation, duly made a bench decision on the 11 day of December, 1991 and the Defendants having moved the Court to reconsider its bench decision rendered on the 11th day of December, 1991, and the motion for reconsideration having been fully submitted on the 7th day of January, 1992 and the Court having rendered a decision dated the 20th day of February, 1992 denying Defendants' Motion for Reconsideration and the Court having directed Plaintiffs to settle a final Judgment on ten (10) days notice,

NOW, on motion of Plaintiff's counsel, ALAN E. WOLIN, ESQ., it is

ORDERED, ADJUDGED and DECREED, that this action be and the same is hereby dismissed as to Defendant JAMES G. PATTERSON; and it is further

ORDERED, ADJUDGED and DECREED, that Defendants HAROLD J. WRIGHT and E.P. STREIDER have denied Plaintiffs procedural due process by failing to grant them a hearing before terminating their towing services; and it is further

ORDERED, ADJUDGED and DECREED, that Defendants HAROLD J. WRIGHT and E.P. STREIDER have denied Plaintiffs their right to free speech and to petition the New York State Police for the redress of grievances; and it is further

ORDERED, ADJUDGED and DECREED, that Plaintiffs, WHITE PLAINS TOWING CORP. d/b/a DON'S TOWING and DONALD CHERICO, do recover of the Defendants, HAROLD J. WRIGHT and E.P. STREIDER, nominal damages in the sum of ONE DOLLAR ($1.00) and that Plaintiffs have execution therefor; and it is further ORDERED, ADJUDGED and DECREED, that Plaintiffs' counsel, ALAN E. WOLIN, ESQ., recover of Defendants, HAROLD J. WRIGHT and E.P. STREIDER, reasonable counsel fees in the sum of $22,700.00 and that ALAN E. WOLIN, ESQ. have execution therefor.

JUDGEMENT signed this 7th day of May, 1992.

HON. CHARLES L. BRIEANT,
Chief Judge

No. 93-121

(2)

Supreme Court, U.S.
FILED
AUG 18 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WHITE PLAINS TOWING CORP.,
d/b/a DON'S TOWING and DONALD CHERICO,

Petitioners,

—against—

HAROLD J. WRIGHT and E.P. STREIDER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Introduction

Respondents Harold J. Wright and E.P. Streider ("respondents") respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because it does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

Statement Of The Case

Troop K of the New York State Police is responsible for, *inter alia*, securing the safety of the public on Interstate Route I-287 in Westchester County, New York. In 1985, when the petitioners' claims arose, both respondents were police officers stationed at Troop K.

For the purpose of assisting motorists with disabled vehicles, Troop K divided Route I-287 into three zones, and assigned one of three towing companies to each zone to provide this service. Under the arrangement, Troop K would dispatch the designated towing company to a disabled vehicle, unless the motorist requested otherwise. As stipulated at trial, this arrangement was not authorized or codified by any statute or regulation of the State Police, was not contractual in nature, and was not awarded on the basis of any bid, license, or permit. (A. 23-24).

In 1984, Troop K assigned one of the three zones on I-287 to petitioners for a two-day period. Some time later in 1984 petitioners were again assigned a zone on I-287, which it serviced for the next 9 to 12 months. During this period, petitioner Cherico orally and in writing made repeated demands for a larger share of towing assignments. In addition, on or about April 19, 1985, Cherico lodged a complaint with the State Police against the respondents, alleging that they had impugned his reputation by stating that he was a "'thief', 'no good', and associated with organized crime." (A. 4). The complaint was withdrawn days after it was lodged. (A. 22).

Some three months later, in a letter dated July 26, 1985, respondent Wright informed petitioner Cherico that the I-287 towing assignment would be terminated on July 31, 1985, and that petitioners would not be summoned for a towing job unless they were specifically requested by a motorist. No reason for the termination was given in the letter.

Wright informed his supervisor of the termination and enclosed a memorandum prepared by Streider. The memorandum set forth various incidents involving Cherico: a complaint from an insurance company that Cherico billed $15,500 for tow work on a trailer and refused to release its cargo to force payment; a complaint by a motorist that while petitioners advertised $5 a day storage, they charged $10; the fact that Cherico made and then withdrew an unfounded complaint that respondents had stated Cherico was connected to organized crime; an admission by a third person that, at Cherico's request, he had filed an unfounded complaint against one of Cherico's competitors; and information suggesting that Cherico or his son may have been responsible for placing an abandoned vehicle with no license plates on a section of I-287 which was assigned to another towing company. (A. 5).

Streider's memorandum concluded by noting that Cherico was a source of annoyance and embarrassment to the State Police, that his constant complaints about insufficient towing jobs caused the police needless wasted time on investigations, interviews, and preparing and reading reports, that Cherico did not have the proper licenses to operate some of his equipment, and that it was not in the best interest of the State Police to have a person of "Mr.Cherico's ilk providing services to the users of an interstate highway patrolled solely by the State Police." (A. 6).

District Court Proceedings

Petitioners thereafter filed complaints with the State Police and the Office of the Governor. When these complaints were unsuccessful, petitioners commenced this action under 42 U.S.C. § 1983. They alleged, *inter alia*, that the I-287 towing assignment was terminated because Cherico exercised his right of free speech in complaining to the State Police about the respondents and that his due process and equal protection rights were violated when derogatory comments were made by

respondents about him, to his detriment, at about the time the towing arrangement was terminated.[1]

After a one-day bench trial, the district court (Brieant, C.J.) dismissed petitioners' equal protection claims, but found Wright and Streider liable for violations of petitioners' rights under the First Amendment and Due Process Clause. The district court rejected respondents' defense of qualified immunity on the due process issue. Because the district court found that there was insufficient evidence to support actual damages, petitioners were awarded nominal damages of $1.00.

Decision Of The Court Of Appeals

On appeal, the court of appeals reversed the judgment in petitioners' favor, dismissed the cross-appeal as moot and directed that judgment be entered dismissing the complaint. (A. 28).

The court held that there was no violation of petitioners' First Amendment Rights, stating that the "vast majority" of Cherico's "speech" involved "demands and complaints" about getting more towing business, comments which did not concern matters of public interest, but rather private commercial interest. (A. 18). While acknowledging that Cherico's complaint against the respondents regarding their conduct as public officers was a matter of public concern and could properly have been found as the substantial motivating factor for the termination, the court concluded that, based upon the record before it and the factual findings of the district court, "[respondents] would indeed have terminated Cherico's towing referrals even in the absence of his short-lived personnel complaint." (A. 20).

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[1] The trial court (Broderick, J.) originally dismissed petitioners' due process and equal protection claims, the latter without prejudice. The final amended pleading included only First Amendment and equal protection claims. The case was reassigned to a new judge who, after trial, dismissed the equal protection claim but found respondents guilty of First Amendment and due process violations. He vacated the earlier order which had dismissed the due process claim with prejudice. (A. 8, A.12).

The court also rejected petitioners' due process claims. The court first found that petitioners had no cognizable property interest in continued towing referrals on I-287, and the termination of their status thus did not implicate due process. (A. 24). Additionally, the court noted that respondents' conduct after the termination, which the district court relied on, was an insufficient basis to find a due process violation because injury to reputation alone does not deprive an individual of a liberty or property interest protected by due process. Rather, "some 'stigma plus' is required." (A. 24).

To establish a "stigma plus" due process claim where no property interest is involved, a party must establish not merely that derogatory charges were made in connection with a termination without a hearing but that the charges were disseminated or "published". In this case, the court found that there was no evidence that respondents made the critical statements to the public in general, to any member of the public in particular or to any person inquiring as to petitioners' towing operations. The statements were only made to other police officers who were not decisionmakers as to towing assignments. The court stated it "doubted" that police officers informing other police officers that an individual has been accused of dishonesty or is believed to have ties to organized crime constitutes sufficient publication to satisfy the "stigma plus" requirement, but held that it need not decide whether such a communication constitutes sufficient publication, because "it is quite clear that respondents are entitled to qualified immunity with respect to this claim". (A. 25-26).

The court held that the respondents were immune from liability because the law was not clearly established on two issues: (1) whether the towing assignment provided petitioners with a status sufficient to give them a due process protected liberty interest in avoiding termination without a name-clearing hearing, and even if the answer was yes, (2) whether the communication by one police officer to another police officer of a charge that a given individual has performed dishonestly

or of his belief that the individual has ties to organized crime can constitute a publication sufficient to violate the individual's liberty interest. (A. 27). Accordingly, the court held that respondents were entitled to qualified immunity, noting it "would be surprised to find" a court which held that on these facts petitioners had demonstrated a due process violation. (A. 27).

REASONS FOR DENYING THE WRIT

A. The Second Circuit Correctly Held That Petitioners' First Amendment Rights Were Not Violated.

The court of appeals' decision that termination of petitioners' motor vehicle towing status with the State Police did not violate the First Amendment is in accord with decisions of this Court. An employee who allegedly has been discharged by the government because he exercised his right of free speech under the First Amendment must establish (a) that he spoke "as a citizen on a matter of public concern," and (b) that his speech was at least a "substantial" or "motivating factor" in his discharge. (A. 16). *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Connick v. Myers*, 461 U.S. 138 (1983); *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775 (2d Cir.), *cert. denied*, 112 S.Ct. 657 (1991). Even if an employee establishes these two elements, a public employer will not be liable if it is established that (a) it would have terminated the employment in the absence of the employee's exercise of free speech, or (b) there was a tipping of the scale in its favor on a balance between the employee's right of free speech "against the extent to which the employee's conduct interfered with the functioning of the workplace . . ." (A. 17). In this balancing, speech which involves a matter of public concern is entitled to little weight if it is raised solely to advance the employee's employment interests. *See, e.g., Connick*, 461 U.S. at 154. (A. 17).

In applying these principles to this case, there can be no dispute that petitioners' termination was lawful. First, petitioners'

speech—the filing of a personnel complaint against respondents—did not raise a matter of public concern. Second, the personnel complaint played only a "slight" role in the termination. Finally, as the court of appeals found, the trial court's findings, "amply supported by the evidence, compel the conclusion that [respondents] would indeed have terminated [petitioners'] towing referrals even in the absence of his short-lived personnel complaint." (A. 20). For example, it is undisputed that the decision to terminate petitioners' assignment was due in part to Cherico's repeated demands for more assignments. Thus, the court of appeals correctly held that petitioners failed to meet the test set forth by this Court for establishing a First Amendment violation.

Petitioners contend, however, (Pet. at 8-10) that the court of appeals erred in not remanding the case to the trial court on this issue, rather than reversing and granting judgment to the respondents. The granting of judgment for the respondents was warranted by the court of appeals's proper application of the law to the facts of this case and that decision does not merit further review.

B. The Second Circuit Correctly Dismissed The Due Process Claim On The Grounds Of Qualified Immunity.

In rejecting petitioners' due process claim, that state action deprived him of a protected property interest, the court of appeals simply applied well-established principles, citing *Matthews v. Eldridge*, 424 U.S. 319 (1976). An interest which the state can terminate "at the whim of another person" is not a property right protected by due process. *Bishop v. Wood*, 426 U.S. 341 (1976); *Goetz v. Windsor Central School District*, 698 F.2d 606 (2d Cir. 1983). Here, it is uncontested that petitioners' towing arrangement with the State was informal and terminable at will and, therefore, not a protected property interest entitled to due process protection. (A. 24).

While the court of appeals recognized that a due process liberty interest may be implicated where the termination does not involve a property right but involves derogatory charges in connection with the state action, creating a "stigma plus" which could damage petitioners' standing and associations and affect future employment opportunities, it held that proof in such cases of sufficient "publication" of the state's charges was essential to meet the stigma plus test, citing *Bishop*. However, the court stated that it "doubted" whether the memorandum by Streider to his supervisor in the State Police that petitioners were dishonest or believed to be associated with organized crime, constituted sufficient publication to satisfy the "stigma plus" requirement. Regardless of these questions, the court held that it need not decide the issue of publication because "it is quite clear that respondents are entitled to qualified immunity" on this claim. (A. 26).

Relying on *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the court held that respondents were entitled to qualified immunity because the law was not clearly established on the question of whether the termination of the towing assignment required a name-clearing hearing and if it did, whether an inter-police department memorandum from one officer to another including a charge that a third person is dishonest and has connections to organized crime constitutes sufficient "publication" to meet the stigma plus test.

Even were this Court to address the publication issue now or in the future, respondents would still be entitled to qualified immunity because the law was unsettled in 1985 at the time of respondents' actions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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